

NO. 46904-9-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

Tammy Lange
Appellant

v.

Edward Lange, Jr.
Respondent

BRIEF OF RESPONDENT

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I. ISSUES ON APPEAL

- 1) Whether the trial court correctly applied RCW 26.09.191(1), (2), and (3) when there was evidence that Ms. Lange physically assaulted the child, and started a fire inside the house?
- 2) Whether the trial court correctly allowed the testimony of Mr. Stehman when Ms. Lange failed to object to his testimony at trial, and when there was no evidence that Mr. Stehman was biased, or that his testimony had any prejudicial effect on the proceedings?
- 3) Did the trial court have substantial evidence to find that Mr. and Ms. Lange engaged in mutual fighting considering Mr. Lange's testimony, and Ms. Lange's credibility issues?

II. STATEMENT OF THE CASE

Edward Lange Jr. (Mr. Lange) and Tammy Lange's (Ms. Lange) were married for 19 years. RP 271. Together they had two children, Eddie, age 17 (turns 18 in Nov. 2015), and Amber, age 16. CP 649. Throughout the marriage, Mr. Lange financially supported the family through his employment with the United States Navy. RP 43. While he was deployed Ms. Lange was the primary caregiver for the children.

There was a lot of discord in the marriage, including yelling back and forth, RP 289, and alcohol fueled fights. RP 112. There were fights that

escalated to a mutual “laying on of hands.” RP 238. The court found that the couple engaged in “drunken brawls.” RP 317.

In August 2012, Mr. Lange decided to separate from Ms. Lange and put his belongings in storage before deploying on August 27, 2012. RP 222. The children were also aware of the separation. RP 292. Although Mr. Lange thought they had separated in August 2012, Ms. Lange wanted to work on the marriage, and contended they had not separated. RP 134. When Mr. Lange returned from his deployment on May 3, 2013, he did not return home to the family home. RP 134.

Soon thereafter, Ms. Lange made allegations of domestic violence against Mr. Lange, and a Military Protection Order was issued on May 13, 2013. RP 130. The order was based on Ms. Lange’s allegations and there was never a hearing. RP 222. As a result Mr. Lange was not to have contact with her. RP 236. Ms. Lange started calling Mr. Lange’s command so frequently that a ship’s liaison was assigned. RP 225.

Throughout Mr. Lange’s deployments, he would text the children. RP 271. But, after his return, his contact with them was limited because of the MPO and because Ms. Lange “would take [the children’s] cell phones periodically.” RP 236. Mr. Lange felt that he “couldn’t do anything directly.” RP 236.

During this time, the children were exposed to several incidents with Ms. Lange that were detrimental to them. RP 76. For instance, Ms. Lange, attempted suicide in front of the children while intoxicated on July 8, 2013. RP 292. “Whenever there was an incident in the home, alcohol was involved.” RP 237.

Amber was sent to Juvenile Detention on October 8, 2014. RP 292. While there, staff learned that she was cutting. RP 292. She was observed to be depressed—she had been isolated and called names by Ms. Lange. RP 292. Despite learning of Amber’s issues, Ms. Lange did not initiate counseling for Amber although it was available. RP 229.

Ms. Lange was instead focused on concerns that she was being stalked and spent thousands of dollars hiring “Father’s Rights Investigation” “a firm to help with security, to ease [her] ... mind.” RP 202. She also went to local casinos, as a “safety concern, because ... [there is] security all around.” RP 255.

Mr. Lange started to become aware of the situation in Ms. Lange’s home when in May 2013, Ms. Lange disabled the fire alarms and locked herself in her bedroom. RP 80, 237. She lit the bed on fire, and refused to come out. RP 237. The police came and she “had to be dragged kicking and screaming and naked from her room.” RP 237. She was taken to the hospital. RP 237.

Mr. Lange was called and he immediately came. RP 237. He stayed the night with the children to make sure they were okay. RP 237. They assured Mr. Lange that they were safe and wanted to remain with Ms. Lange. RP 81. Child Protective Services (CPS) were also notified and agreed that the children could stay in the home at the time. RP 292.

Then on October 17, 2013, Ms. Lange again became intoxicated. She physically assaulted Amber, biting her and hitting her. RP 75. The police were called to the home again, observing that Ms. Lange was intoxicated; they tried to diffuse the situation. The next morning Amber found Ms. Lange unresponsive. RP 292. She called for help and Ms. Lange was taken to the hospital and referred for mental health treatment. RP 292. CPS investigated the incident and determined that the physical abuse, by Ms. Lange, was “founded.” RP 76.

A dependency action was initiated by CPS and Mr. Lange immediately responded when he was notified. RP 67. Mr. Lange had been alcohol free for over two years. RP 78. The children were placed with him. RP 67. Once they were placed with him he initiated group counseling with Mr. Stehman. RP 68. He felt that they would all benefit from counseling, since the children had been exposed to Ms. Lange’s problems. RP 70.

At trial Ms. Lange told the court “I don’t know what to do because this situation is a lot bigger than I can handle.... I don’t even know if, because of

all of this, what's the best place for my children, if it would even be with me.”
RP 280.

III. ARGUMENT

a) Standard of Review

The appropriate standard of review for parenting plan orders is abuse of discretion. *In re Marriage of Katare*, 175 Wn. 2d 23, 35, 283 P.3d 546 (2012). A trial court abuses its discretion when its “decision is manifestly unreasonable or based on untenable grounds.” *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). “A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard.” *Id.* at 47.

RCW 26.09.187, read in conjunction with RCW 26.09.191, sets forth the criteria for establishing a permanent parenting plan. This criterion limits a court’s range of discretion. A court abuses its discretion if it fails to follow the statutory criteria.

b) The trial court did not err in restricting Ms. Lange’s residential time with the children due to a finding that she physically abused the children.

The trial court has authority to impose restrictions under RCW 26.09.191. *In re Marriage of Watson*, 132 Wn. App. 222, 232, 130 P.3d 915, 919 (2006). RCW 26.09.191(1), (2) are mandates, requiring the court to restrict a parent’s decision-making and involvement. RCW 26.09.191(3) is

discretionary, permitting a trial court to restrict a parent's actions. RCW 26.09.191(1) prohibits a court from requiring mutual decision-making if physical abuse of a child is present. RCW 26.09.191(2)(a)(ii) *requires* a court to limit a parent's residential time with the children if there is evidence of physical abuse of a child. If it is in the child's best interest, RCW 26.09.191(3)(c) permits the court to restrict any provisions of the parenting plan, including visitation, if there is "long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions."

The trial court was required to limit Ms. Lange's residential time because there was a determination that physical abuse against a child was founded. Although the court noted that Ms. Lange had been the primary parent, the record showed that the CPS determined that the allegation of physical abuse of a child against Ms. Lange was founded. RCW 26.09.191(2)(ii) requires the trial court to limit residential time if there is documented physical abuse. In accordance with the statutory requirements, the court placed the children with Mr. Lange as the primary parent. Final Parenting Plan 2.

Under RCW 26.09.191(3)(c) the trial court had authority restrict Ms. Lange's visitation. The record demonstrated that Ms. Lange alcohol use interfered with her parenting functions. RP 237. Furthermore the court found

that her alcohol use adversely affected the children. RP 318. Based on this evidence and finding the trial court has discretion to restrict Ms. Lange's visitation.

The record reflects that the decision of the court was based on consideration of the statutory factors set forth in RCW 26.09.191(1), (2), and (3), therefore, the trial court did not abuse its discretion.

Furthermore, the only evidence that Ms. Lange relies upon to show the "cumulative nature of her parenting ability" is that the children got good grades in the past. First, the children's grades are one aspect only, and hardly exemplify what is "cumulative." Second, there is no evidence linking the children's poor grades with living with Mr. Lange. In fact, it is within the realm of possibility that the children's poor grades are due to the mental anguish and physical abuse they suffered with Ms. Lange. Third, Ms. Lange's prior parenting ability is seriously undercut by her subsequent suicide attempt, starting a fire inside the house, repeated intoxication, and physical and mental abuse of the children.

- c) The trial court did not err by allowing Mr. Stehman's testimony because Ms. Lange did not object and there is no evidence that his testimony was biased or that it had any prejudicial effect on the proceedings.

An assignment of error needs to be preserved at the trial court for it to be addressed on appeal, unless the error is a " 'manifest error affecting a

constitutional right.’ ” *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (quoting RAP 2.5(a)). To raise an error for the first time on appeal under RAP 2.5(a), the appellant must show (1) the error is manifest and (2) the error is truly of constitutional dimension. *Id.* An error is manifest if there is actual prejudice. *Id.* at 99. There is actual prejudice if the asserted error had practical effect on the trial of the case. *Id.*

Ms. Lange does not contend, and nothing in the appellate record indicates, that she objected to allowing the witness testimony of Mr. Stehman. Therefore, the issue is waived unless it is a manifest error. RAP 2.5(a).

Although Ms. Lange makes a speculative assertion that Mr. Stehman would prejudice the court during the proceedings, there is no evidence that it did. In fact, Ms. Lange’s questioning clearly illuminated to the trial court that Mr. Stehman was treating Mr. Lange and the children “as a family,” and that they were all his “clients.” RP 101. There is no evidence that Mr. Stehman treated Mr. Lange prior to treating the children. The record reflects that the court is clearly aware of any potential bias as a result of this “group counseling” when it questions Mr. Stehman about the efficacy of group counseling. RP 108-109.

Ms. Lange fails to show that Mr. Stehman’s testimony had any real effect on the final parenting plan, let alone a prejudicial effect. The record actually indicates that the court does not rely on Mr. Stehman’s opinion. First,

the court orders that both children “immediately” begin individual counseling with a specialized therapist, not Mr. Stehman. Final Parenting Plan at 5.

Second, the court does not predicate any future visitation upon Mr. Stehman’s opinion; instead future visitation is “in accord with the recommendations of the [individual] counselors for the children and mother.” *Id.*

Ms. Lange impermissibly relies on inadmissible evidence to allege Mr. Stehman’s bias. To introduce the fact that Mr. Lange had an established relationship with Mr. Stehman prior to commencing group counseling, creating “immense bias,” she cites her own Notice of Appeal, filed after the trial on November 14, 2014. Brief of Appellant at 12. There is no evidence of this fact in the trial record.

- d) The trial court had substantial evidence to find that both Mr. Lange and Ms. Lange were perpetrators of domestic violence.

The standard of review for findings of fact is substantial evidence review. *In re Knight*, 178 Wn. App. 929, 937, 317 P.3d 1068, 1072 (2014). Substantial evidence is found if the “record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *In re Marriage of Fahey*, 164 Wn.App. 42, 55, 262 P.3d 128 (2011). When “the evidence conflicts, a reviewing court must determine only whether the evidence most favorable to the prevailing party supports the challenged findings.” *State v. Black*, 100 Wn.2d 793, 802, 676 P.2d 963

(1984). The “trial court’s determinations on the persuasiveness of the evidence, witness credibility, and conflicting testimony” are given deference. *In re Knight*, 178 Wn. App. 929, 937, 317 P.3d 1068, 1072 (2014). Credibility determinations are for trier of fact and cannot be reversed on appeal. *State v. Vazquez*, 66 Wn.App. 573, 832 P.2d 883 (1992).

The trial court’s conclusion that both Ms. Lange and Mr. Lange engaged in “drunken brawls” is supported by substantial evidence. RP 317. Ms. Lange assigns error to this conclusion because the court did not label Mr. Lange as the sole perpetrator of violence. Although Mr. Lange agrees that there was domestic violence in the marriage, unlike Ms. Lange, he testifies that the violence was mutual. RP 127.

After observation of both Mr. Lange and Ms. Lange’s testimony, the court concluded that there was drinking in the home resulting in “drunken brawls” between the parties. RP 317. The court evidently made a credibility determination. It was reasonable for the court to find Mr. Lange’s testimony more credible because, in addition to Ms. Lange’s mental health issues, evidence showed that Ms. Lange squandered thousands of dollars of the community funds and Mr. Lange’s separate funds (RP 60)—evidently for Father’s Rights Investigation, casinos, and toilet paper. RP 268, 266.

Ms. Lange’s allegations against Mr. Lange for indecent exposure to her daughter from a previous relationship, Jessica (who is not a party to this

action) do not substantiate a finding of domestic violence by Mr. Lange, nor does it warrant a different outcome for the parenting plan. First, Ms. Lange again cites to evidence on appeal that was never admitted at trial. CP 485, 517, 602. She cites to a trial brief, her pre-trial declaration, and her motion to show cause. None of these documents were admitted at trial, and they did not contain any findings by the trial court. CP 620-622. Furthermore, although the alleged indecency occurred in 2004, Mr. Lange was not charged until about 10 years later. RP 128, CP 485. In fact, Mr. Lange had to waive the statute of limitations for the charge. It is noteworthy that the charge was brought shortly after Mr. Lange separated from Ms. Lange, after Ms. Lange's mental health lapse, and after CPS removed the children from Ms. Lange. The charge was retaliation by Ms. Lange.

Likewise, Military Protection Orders requested by Ms. Lange do not substantiate her allegations of domestic violence. The MPOs were issued simply as a result of Ms. Lange's allegations of domestic violence against Mr. Lange. The MPOs are nothing but further evidence of her allegations. There was never any hearing regarding the MPOs. RP 222. Whereas at trial, the court considered testimony and evidence, and correctly determined that Ms. Lange was also a domestic violence perpetrator.

IV. CONCLUSION

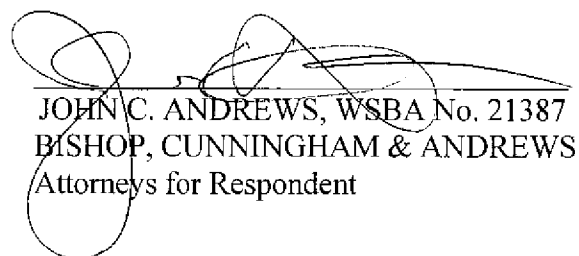
First, the record reflects that the decision of the trial court in this case was based on a consideration of the statutory criteria set forth in RCW 26.09.191(1), (2), (3), and on the evidence presented. Based on Ms. Lange's attempted suicide, starting a fire in the house, alcohol abuse, and physical abuse of the children, the trial court's order restricting her time with the children was not manifestly unreasonable, and the court did not abuse its discretion.

Second, the court did not err by admitting the testimony of Mr. Stehman. Ms. Lange did not object to Mr. Stehman's testimony at trial, and this issue cannot now be raised on appeal. Furthermore, there is no evidence that Mr. Stehman's testimony was biased—there is no evidence that Mr. Stehman treated Mr. Lange individual prior to treating the children. Even if, for argument sake, Mr. Stehman was biased, the record reflects that the testimony did not prejudice the court proceedings or the final parenting plan.

Finally, there is substantial evidence to support the trial court's finding that Mr. Lange was not the sole perpetrator of domestic violence. The court must defer to the trial courts findings regarding witness testimony and credibility. There was testimony before the court that the parties engaged in mutual fighting, and the court evidently found Mr. Lange's testimony more credible on that subject.

For the foregoing reasons, Mr. Lange respectfully requests that the court affirm the trial court's decision. Furthermore, Mr. Lange requests that, pursuant to RAP 18.1, the court order Ms. Lange to be responsible for Mr. Lange's costs and legal fees incurred due to her frivolous and meritless appeal. *Foisy v. Conroy*, 101 Wn. App. 36, 43, 4 P.3d 140 (2000). Ms. Lange appeals issues to which she did not object at trial; she cites to evidence that was not before the trial court; she glosses over her actions with respect to her suicide attempt, starting a fire in the house, and CPS findings that she physically abused the child (all of which occurred shortly before trial); and she appeals the parenting plan of children who are nearly 18. This appeal is wholly without merit, and it has resulted in Mr. Lange incurring attorney's fees in responding.

DATED this 28th day of August, 2015.


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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

I am a legal assistant for John C. Andrews, and on the below indicated date, I caused the foregoing document to be served in the manner described to the following:


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Signed in Bremerton, Washington this 28th day of August, 2015.

BISHOP, CUNNINGHAM & ANDREWS, INC. (P.S.)



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